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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Dr. TENKASI M. VISWANATHAN --- PETITIONER

VS.

THE FAYETTEVILLE STATE UNIVERSITY

BOARD OF TRUSTEES et al. --- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Chadbourn NC 28431
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QUESTIONS PRESENTED

1. What constitutes a contract, when an old candidate applies for a new faculty appointment under explicit orders from a supervisory Board and the terms of the review for the new appointment are set out to be those for reappointment as set forth in the published university regulations? Does not the published handbook of regulations provide a species of contract?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

T.M. VISWANATHAN, Plaintiff-Appellant;

THE FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES, THE CHANCELLOR OF FAYETTEVILLE STATE UNIVERSITY, DR. LLOYD V. HACKLEY in his official and individual capacity, and Dr. JON YOUNG in his official and individual capacity, Defendants-Appellees.

This petition is not being submitted by or on behalf of any corporation, and there is no parent or subsidiary company to be listed by the petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The **Opinion** of the United States Court of Appeals for the Fourth Circuit appears in Appendix A at page A-1 to the petition and is unpublished. The opinion was entered on September, 19, 1997. The **Order** of the United States Court of Appeals for the Fourth Circuit denying Petition for Rehearing was entered on November 4, 1997. The order appears in Appendix C at page A-41.

The Order of the United States District Court for the Eastern District of North Carolina granting Summary Judgment in favor of the Defendants was entered on April 28, 1997. The Order appears in Appendix B at pages A-5. **JUDGMENT** in the case was entered on April 29, 1997 in

favor of the Defendants by the United States District Court for the Eastern District of North Carolina (Appendix B at p. A-3.).

The first administrative decision of the University of North Carolina Board (UNC Board hereinafter) of Governors was entered on September 16, 1991. This decision authorized Petitioner to reapply to Fayetteville State University (FSU) for a new appointment under the terms of the university regulations for reappointment. Appendix B at A-17, A-19.

The Order on Petition for Judicial Review was entered by the Superior Court of New Hanover County, State of North Carolina on February 24, 1993. The Order reversed the second administrative decision of the UNC Board of Governors denying Petitioner's contractual right to review by the Hearing and Reconsideration Committee of FSU of the second non-reappointment decision of FSU. Appendix B at p. A-28. The second UNC Board decision, reversed by the New Hanover County Superior Court appears in Appendix B, at p. A-24, A-25. The final decision of the FSU Board of Trustees was entered on October 14, 1993 and appears in Appendix B at

p. A-32. The final administrative decision of the UNC Board was adopted on September 9, 1994. Appendix B at A-34.

JURISDICTION

The date on which the United States Court of Appeals decided the case was September 19, 1997. The unpublished decision simply affirmed the decision of the District Court. The District Court held that in the absence of a new contract, only an old contract that had expired in 1990 determined the rights of the parties. The District Court held that as a result of the old contract, "time began to run on 8 February, 1990, when plaintiff first received notice that he would not be reappointed." Appendix B at page A-14. The District Court totally ignored the fact that there **was a new application** for a **new appointment** that was triggered by the September 16, 1991 decision of the UNC Board of Governors and that the standard of review would be as set forth in the FSU tenure regulations for reappointment of faculty. The District Court appears to have held the promise contained in the September 16, 1991 Order of the UNC Board as illusory.

A timely petition for rehearing was denied by the United States Court of Appeals on November 4, 1997.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C., Section 1254(1).

Petitioner is an alien and stated five claims alleging breach of contract and violation of civil rights guaranteed by 42 U.S.C., Sections 1981 and 1983. All claims were based on contractual rights.

The jurisdiction of the Supreme Court of the United States to review the **Orders** in question by writ of certiorari is conferred by Rule 10.1(b, c) of the Rules of the Supreme Court. This case poses the question as to what constitutes a contract, when an administrative decision contains a promise and a consideration and the terms of that promise and consideration are set forth in the official university publication on faculty appointments.

Claims under 42 U.S.C., Section 1981 must arise from contractual underpinnings. An alien's claim based on breach of contract is a federal question. In the instant case, Rule 10(b) of

the Rules of the Supreme Court applies, because two state courts of last resort have decided this important federal question in a way that conflicts with the decision of the United States Court of Appeals for the Fourth Circuit. In Small v. Springs Indus., 292 S.C. 481, 357 S.E.2d 452 (1987), the South Carolina Supreme Court reached a different conclusion from that of the Fourth Circuit Court of Appeals. The Supreme Court of Michigan similarly reached a different conclusion from that of the Fourth Circuit Court of Appeals in Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 619, 292 N.W. 2d 880, 895 (1980).

Jurisdiction of the Supreme Court of the United States to review this case also arises under Rule 10(c) of the Rules of the Supreme Court, since it does not appear that this Court has considered civil rights questions that are based not on explicit contract, but on published regulations of a public institutions of education and the promise and consideration like the one contained in the September 16, 1991 UNC decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition involves the provision of Equal Rights under the Law that are conferred by 42 U.S.C., Section 1981 and Application of that provision under 42 U.S.C., Section 1983. It also involves breach of contract claim under the original jurisdiction of the District Court; Petitioner is an alien. Additionally the case involves the university regulations published under the caption: "Tenure Policies and Regulations of Fayetteville State University", prescribing standards of review for new appointment as well as reappointment to the faculty of FSU; the regulations from the Code of the University of North Carolina; and North Carolina Judicial Review Statutes. Appendices D, E, and G.

STATEMENT OF THE CASE

Petitioner Viswanathan was Plaintiff-Appellant before the United States Court of Appeals for the Fourth Circuit. Fayetteville State University is one of the constituent institutions of the University of North Carolina. Persons applying for a faculty position at FSU do not need the permission of any organization to submit an application.

However the standard of review for new applicants is carried out under the standard of (new) appointments. The standard of review for reappointment to the faculty is totally different from that of the review for (new) appointments. Any appointment to a specific rank that goes under the designation of "Assistant Professor", "Associate Professor", or "Professor" are termed tenure-track appointments according to the regulations of FSU. Appendix D at A-45, A-46.

On September 28, 1991, Petitioner Viswanathan applied to a faculty position of "Associate Professor" in the Department of Mathematics and Computer Science. District Court's Order at A-7. At that time Viswanathan was not a faculty member at FSU. Under such circumstances, his application would normally be reviewed under the standard for new appointees. FSU held that position and several orders had to be entered to change the course of the review. District Court's Order at A-7, first paragraph, and the Order on Petition for Judicial Review at A-29 (last paragraph), finding that the review in 1992 was based on unlawful procedure.

When Viswanathan applied for a position of "Associate Professor" at FSU on September 28, 1991, there was an order or a decision from the UNC Board of Governors that had been entered on September 16, 1991. Appendix B at A-23, A-24. The order of the UNC Board contained a promise and consideration, when it stated that, should Viswanathan apply for a new position at FSU, his credentials should be reviewed under the standard of appointment for reappointment to faculty ranks. The UNC Board's decision stated as follows:

> "[T]he Committee recommends that . . . Professor Viswanathan be given an opportunity to request reappointment as an Associate Professor. This request, if made, should follow the procedures prescribed by FSU Tenure Regulations and should be initiated at the department level." Appendix B at A-24.

Viswanathan was presented with an opportunity to influence a favorable decision during the second review. There is a world of difference between a review for a new appointment and a review for reappointment. All reviews, whether they are for new appointment or for reappointment pass through the administrative channels for review that are prescribed in the regulations. Section 3.C(1), Appendix D at A-

49, A-50. The review is initiated at the department level, and passes through the Dean, the Provost/Vice Chancellor for Academic Affairs, and the Chancellor. The prescribed channels for review are stated in Section 3.C(1) at A-49, A-50. A recommendation may be favorable recommending appointment or reappointment, or it may be unfavorable, recommending non-appointment or non-reappointment. Appointments, and Reappointments.

In the case of a new appointment, the Chancellor makes the final decision. His decision is not reviewable. The Chancellor can make a favorable appointment, even if a reviewing administrative officer below the Chancellor had made an unfavorable recommendation. In the case of a new appointment, the Chancellor holds and wields the power of final decision, and that decision is not reviewable. Only a decision for non-reappointment or non-promotion is reviewable. Appendix D, Section 3.C.(1) at A-50, second paragraph, and Section 3.C.(2) at A-51. Also the Code of the UNC Board, Appendix E, Section 604 A at A-69.

In the case of a reappointment, the FSU Tenure Regulations present a totally different picture. If one of the Officers below the Chancellor, that is if the Department Chairman, Dean, or the Provost/Vice Chancellor for Academic Affairs makes an unfavorable recommendation for reappointment, then that recommendation becomes a decision, and the decision is final unless it is contested. Appendix D, Section 3.C(2) at A-51. The grounds for contestation are limited to those stated to be impermissible in Section 5.A of the FSU Tenure Policies. Appendix D, Section 5.A at A-53, A-54. Also the Code of the UNC Board, Section 604 B at A-71.. In such a case, when an unfavorable decision recommending non-reappointment has already been made by an officer of lower rank than the rank of the Chancellor, the Chancellor does not make any decision favorable or unfavorable. The unfavorable decision is only communicated to him for his knowledge. Appendix D, Section 3.C(2) at A-52. (The channels prescribed for review are stated above, see Appendix D, Section 3.C(1). The finality is reached through a process of

contestation and review of the appeal proceedings. Finality is reached, if the unfavorable decision is not contested; if the decision is contested as being based on impermissible grounds explicited in Section 5.A of the FSU Tenure Policies, then finality is suspended, and finality is reached only upon completion of prescribed proceedings enunciated in Section 5.A. Appendix D, Section 3.C(2) at A-51. Finality is rendered by the FSU Board of Trustees. See Appendix D, Section 3.C(1) at A-50 last few lines (The Chancellor has finality of decision only for favorable recommendations.) Also last few lines of Section 3.C(2) at A-52. (The Chancellor only receives information that an unfavorable recommendation has been made, when an Officer of lower rank has made an unfavorable recommendation.)

Of course, if all the reviewing officers below the rank of the Chancellor, that is if the Department Chairman, the Dean, and the Provost/Vice Chancellor --- all of then have made a favorable recommendation for reappointment, then the Chancellor has a significant role to play in the reappointment

process. The final decision rests in this case with the Chancellor, provided his decision is not contested. Section 3.C(1), second paragraph at A-50. If the Chancellor's decision is contested as being based on impermissible grounds, then finality is suspended and finality is reached through yet another process of appeal proceedings. See Section 5.B, footnote 6 at A-54, and the Code, Section 501(C) at A-62 (Appeal to the UNC Board through the President of UNC). Please also see N.C. Administrative Procedure Act, G.S., Section 150B-1 (The same person shall not make both a decision and adjudication).

This significant difference between a new appointment and a reappointment in reaching finality of a decision is made available by the FSU Tenure Policies in order to protect Academic Freedom. The phrase "academic tenure" is used in a very broad sense. Appendix D at A-45, second paragraph. It "is intended to secure" for faculty members "their academic freedom" and "help the institution attract and retain faculty members of high quality.. Appendix D at A-44 (last few lines), and A-45 (first line). Academic tenure "refers to the

protection of a faculty member against involuntary suspension or discharge from employment" except upon specified grounds. Appendix D at A-45, first paragraph. "Academic tenure . . . pertains exclusively to the employment of faculty members by appointment to specific faculty ranks." Appendix at A-45, second paragraph. The rank of Associate Professor is one such specific faculty rank (at A-46) and academic tenure of an Associate Professor may not be withheld on grounds that are specifically stated to be impermissible in Section 5.A. of the FSU Tenure Policies. Appendix at A-46 and Section 5.A at A-55, opening lines on nonreappointment of persons on probationary terms).

As stated at the beginning of this "Statement of the Case", Petitioner Viswanathan did not need the authorization of the UNC Board to apply for a faculty position at FSU. He would however, need a special order, if the standard of review of his credentials for the appointment, he was seeking, be different from the standard of review for new appointments. As

stated in the foregoing, such an order was entered on September 16, 1991 by the UNC Board.

The UNC Board had entered its September 16, 1991 order pursuant to its findings that are stated in the order at Appendix B at A-21 -A-23. Petitioner Viswanathan had been employed during the academic year 1989-90 as Associate Professor in the Department of Mathematics and Computer Science at FSU. As an Associate Professor, he was on tenure track and enjoyed the incidents of tenure. Academic tenure, that is reappointment was withheld at the end of his initial one-year contract. Academic tenure could be withheld on any grounds except on the grounds stated to be impermissible in Section 5.A. of the FSU Tenure Policies. Appendix D at A-53, A-54 and the Code at A- 69. The recommendation not to reappoint Viswanathan was made by Dr. Joseph Monroe, the Vice Chancellor for Academic Affairs. As a recommendation denying reappointment, the recommendation of Dr. Monroe became a decision. Petitioner contested the decision of Dr. Monroe as one being based on impermissible grounds. Under

Section 5.A. of the FSU Tenure Policies, a nonreappointment decision of an associate professor is based on impermissible grounds, if it is established that the decision was based on the faculty member's exercise of rights guaranteed by the First Amendment to the United States Constitution, or based on considerations of the faculty member's race, sex, religion, or national origin, religion, or based on personal malice.

Viswanathan contested the non-reappointment decision of Dr. Monroe alleging that the negative decision was an act of retaliation for the remarks he had made criticizing the academic policies of the Vice Chancellor in a public meeting before the Chancellor on or about December 4, 1989. See Appendix D at A-21, A-22. He then activated the process of contested proceedings set forth in Section 5.A. by appealing the matter to the FSU Hearing and Reconsideration Committee. After its proceedings, the Committee held that Petitioner had satisfactorily established his contention and recommended reinstatement. At A-18, second paragraph. The findings and the recommendation of the Hearing Committee

were then transmitted to the FSU Board of Trustees through the official medium of the Chancellor. Appendix at A-63, A-64. The FSU Board did not accept the recommendation of the Hearing Committee. Then the matter was appealed to the UNC Board of Governors. The UNC Board found that the decision was tainted by a violation to the First Amendment. At A- 27. The UNC Board then held that while a new review free from the prior taint was in order, the university should also have a renewed opportunity to consider the "current credentials" of the Petitioner. At A-23, A-24. The UNC Board asked that Viswanathan reapply to FSU to the rank of Associate Professor as a new candidate, but that the standard of review be that of a review for reappointment as set out in the FSU Tenure Policies.

As stated in the foregoing, Petitioner Viswanathan then did submit an application for employment. At A-27 and A-37, top line. After much delay and another appeal, the review that was ordered by the UNC Board was finally undertaken in March. 1992. District Court's Order at A-7. At the expiration

of the deadline set out by the UNC Board, the Chancellor notified Dr. Viswanathan that a position would not be offered to him." The decision was then upheld by the UNC Board through its order of June 12, 1992. Appendix at A-37.

Through its order of September 16, 1991 the UNC Board had ordered that the standard of review of Petitioner's credentials be the standard of review for reappointment. That standard confers the right to contest a negative decision under the limited grounds stated to be impermissible in Section 5.A. of the FSU Tenure Policies. Thus, when Petitioner was not reappointed after the second review in 1992, Petitioner "sought to appeal the decision not to offer him an appointment through the campus procedures for non-reappointment cases". FSU held that since Viswanathan was not employed at FSU during the year 1991-92, when the second review took place, he could not invoke the standard of review for reappointment. As a result, "these avenues [of contested proceedings enunciated in Section 5.A. of the FSU Tenure Policies] were not made available to him". Appendix at A-37 and A-38.

Thereupon, Petitioner "filed suit [judicial review of the June 12, 1992 administrative decision under N.C.G.S., Section 150B-43 at A-75] in New Hanover County Superior Court, contending that he had a right to the campus appeal proceedings". Appendix at A-38. "The [New Hanover County Superior] court agreed that he [Petitioner] had a right to such appeal proceedings in accordance with the FSU procedures and ordered that this process should begin. Appendix at A-38.

Petitioner's **Complaint** in the District Court for the Eastern District of North Carolina begins with this Order on Petition for Judicial Review entered by the New Hanover County Superior Court entered on February 24, 1993. Appendix at A-28. In the 1992 review that was undertaken upon order of the UNC Board, the first recommendation for non-reappointment had been made by Dr. Jon Young, then Acting Dean of the College of Arts and Sciences. See District Court's Order at A-7. Under the standard of reviews for reappointment of associate professors, Dr. Young's recommendation became a decision. Petitioner Viswanathan

contested that decision contending that the decision was based on all three of the impermissible grounds prohibited by the FSU Tenure Policies. In his recommendation document, Dr. Young stated that he revisited the original grounds upon which Dr. Monroe had based his 1990 decision of non-reappointment, and that he, Dr. Young, agreed with Dr. Monroe's decision. Petitioner then asserted that the new review done by Dr. Young was not free from the original taint caused by the violation to the First Amendment.

Petitioner also contended that there were both personal malice and First Amendment violation, based on the following circumstances. During the academic year 1990-91, Dr. Young was Chairman of the Department of Humanities and as Chairman, had tried hard to build a file against a tenured faculty member of the Department of Humanities, by name Dr. Kobina Oguah. Dr. Young had recommended that the appointment of Dr. Oguah be terminated, even though Dr. Oguah was tenured. Dr. Oguah was then placed under suspension by Chancellor Hackley. Dr. Oguah had contested

the decision, and since, Dr. Oguah was a tenured faculty member, FSU had the burden of proof in showing that Dr. Oguah had been negligent in his duties. The proceedings took place in December, 1991, when the second review of Dr. Viswanathan's credentials was pending at FSU. In such proceedings, Dr. Oguah would be allowed a faculty member to represent him. FSU was represented by the N.C. Attorney General Office. The proceedings were not going favorably for Dr. Oguah. Thereupon, during a short recess, Dr. Oguah called upon Petitioner Viswanathan to represent him. Petitioner was singularly responsible for the turning of the tide in favor of Dr. Oguah. Petitioner raised questions of academic merit and showed that Dr. Oguah was both a successful teacher and a researcher. The Hearing and Reconsideration Committee seized the occasion showing that while Dr. Oguah had not been spectacular in following administrative orders, his omissions did not rise to the level of negligence. His academic performance outweighed any short comings that might have arisen as a result of his failure to follow administrative orders

of no consequence. The Hearing Committee then concluded that the FSU Administration had not carried its burden of proof and recommended reinstatement of Dr. Oguah. Soon after, Dr. Oguah was reinstated.

Petitioner Viswanathan contended that in representing Dr. Oguah before the Hearing Committee against the decision of Dr. Jon Young, he had exercised his rights under the First Amendment by seeking redress of Dr. Oguah's grievances by petitioning the proper governmental authorities and in doing so, he had defeated Dr. Jon Young, who had spent a year building the file against Dr. Oguah. The 1992 unfavorable decision of Dr. Young coming soon after Dr. Oguah's hearing was an act of retaliation for Petitioner's exercise of his First Amendment rights in seeking redress of grievances. In as much as Dr. Young was defeated in his purpose of terminating the tenured appointment of Dr. Oguah, the non-reappointment decision of Dr. Young as Acting Dean was based on personal malice.

Petitioner also contended that the non-reappointment decision of Dr. Young was also based on consideration of the alien status of the Petitioner, since Dr. Young considerably delayed the reviewing process by asking for visa documents and employment eligibility documents authorizing employment emitted by the Immigration and Naturalization Service (INS). This was like putting the cart before the horse, as it is the university that has to sponsor such authorization. Petitioner needed such authorization by the INS. Moreover, it was not for Dr. Young, as Dean of the College of Arts to ask for such documents. Such verification belongs to the domain of the Director of Personnel. Indeed, by delaying the offer of appointment, one could effectively preempt employment by making the offer at the last minute and then pleading that the candidate could not produce the required authorization in a timely manner. As one subject to the jurisdiction of the United States, Petitioner had equal rights to contract under the purview of 42 U.S.C., Section 1981.

Petitioner pleaded before the New Hanover County Superior Court that he had a right to the contested proceedings based on the foregoing allegations. The Superior Court agreed In its finding of facts, the Order on Petition for Judicial Review (Appendix at A-29, A-30) stated that the June1992 decision of the UNC Board was based on unlawful procedure, in as much as Petitioner was not given an opportunity to show if the decision of Jon Young was based on impermissible grounds. At A- 29, A-30. The Superior Court thereupon reversed the June 16, 1992 decision of the UNC Board and ordered that the contested proceedings should begin and follow the FSU Tenure Policies.

The Hearing before the Hearing Committee was held in June, 1993. The Hearing Committee sustained Petitioner's contentions on all three impermissible considerations by Dr. Young. Appendix at A-38.

After the recommendation of the FSU Hearing and Reconsideration Committee, the mandatory provision in

Section 5. G at A-61 was not complied with. Appendix at A-61. The regulation states:

> Within five days after receiving such a recommendation [from the Hearing and Reconsideration Committee], the department chairman [the Dean] shall notify the faculty member, his own immediate supervisor, and the chairman of the Hearing and Reconsideration Committee what modifications, if any, he will make with respect to his original decision not to reappoint.

Petitioner showed by affidavit in the District Court that such a communication was never received by the Petitioner and that the Official Record did not show any such communication from Dr. Young. Instead, Respondent Dr. Hackley made a de novo decision through a letter dated August 2, 1993 in which he stated that Petitioner "will not be reappointed to the faculty of Fayetteville State University." At A-38.

Petitioner contested the decision of Dr. Young and it was the non-reappointment decision of Dr. Young that was under appellate scrutiny. The FSU Chancellor as executive head of the university, has no appellate jurisdiction in a

contested proceeding. On October 5, 1993, the FSU Board of Trustees converted the decision of Dr. Young into a decision of Dr. Hackley and stated as follows (Appendix at A-33):

> The Board concluded to accept the Chancellor's decision and confirmed the chancellor's authority to not reappoint you to a faculty position."

Thus the FSU Board again converted the review to one of a new appointment, abandoning the review for reappointment.

The Complaint stated that this conversion of Dr. Young's decision to one of Dr. Hackley's decision was a breach of contract, and asserted five claims arising as a breach of the contract. Except for two claims, all were asserted under 42 U.S.C., Section 1983, as arising from deprivation under color of state law of rights guaranteed under 42 U.S.C., Section 1981. One of the claims was based on breach of contract and another based on deprivation of rights and damages arising from personal malice.

The District Court, never considered, the new application for appointment that had been submitted in

September, 1991. The District Court based its decision on the original contract that Petitioner held during the academic year 1989-90. That contract was an initial tenure-track appointment for one year and expired in May, 1990. It did not consider the September 16, 1991 decision of the UNC Board and the Order on Petition for Judicial Review as conferring contractual rights.

REASONS FOR GRANTING THE PETITION

The decision of the District Court and that of the Fourth Circuit Court of Appeals are in conflict with rulings of two state courts of last resort. The question before the Court is: "What constitutes a contract under the circumstances obtained in this case?" The District Court appears to have considered the promise contained in the September, 1991 decision of the UNC Board of Governors as illusory.

An employer's handbook of regulations furnishes a species of contract. In Small v. Springs Indus., 292 S.C. 481, 486, 357, S.E.2d 452, 455 (1987), the Supreme Court of South Carolina stated as follows:

> We hold that a jury can consider an employee handbook along with other evidence, in deciding whether the employer and employee had a limiting agreement on the employer's at-will employment status."

The alleged employment contract is based on agreement which requires mutual assent and consideration. See 1, Corbin on Contracts, Vol 21 at 54 (1963). "An employment contract requires an exchange of valuable consideration, which may consist of either a benefit accruing to a party or a detriment suffered by another party. Refraining from doing something that one has a legal right to do constitutes good consideration, regardless of the value of that right to the other party." 27 Amer. Jur. Prudence, 2d. Section 1, p.552 (1996).

In Toth v. Square D. Co., 712 F.Supp., 1231, 1234, 1236 (D.C.S.C. 1989), the District Court of South Carolina cited the Small Court and based its decision on principles of equity and fairness. The employer had to be in compliance with the provisions of the handbook.

Under the provisions of the FSU Tenure Policies, Dr. Young had to notify The Petitioner whether he would make

modifications to his original decision not to reappoint. Section 5.G at Appendix A-61. The FSU Board of Trustees could not by any means convert the decision of Dr. Young to one of Dr. Hackley. Petitioner had an opportunity to contend only the decision of Dr. Young. Under the altered circumstances where the original decision of Dr. Young was abandoned and converted to one of Dr. Hackley, had there been at least a semblance of a hearing, giving the Petitioner an opportunity to contest the decision of Dr. Hackley, it could be said that the review process was fair and consistent with the regulations. Such a hearing of Dr. Hackley never took place. The regulations provide for a contested hearing of Dr. Hackley's decision, only when the first non-reappointment decision is made by the Chancellor and all officers below him have made favorable recommendations. Appendix at A-54, footnote 6. In the instant case, the first unfavorable decision was made by Dr. Young as Acting Dean.

In Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 619, 292 N.W. 2d 880, 895, the Michigan

Supreme Court held that once a policy is announced with a certain view, for example to obtaining a review free from taint, the employer may not treat its promise as illusory. The District Court however, does not appear to have paid any attention to the illusory nature of the promise contained in the September 16, 1991 decision of the UNC Board of Governors.

In Walker v. Westinghouse Electric Corporation, 77 N.C. App. 253, 259, 335 S.E. 2d 79, 83 (1985), the North Carolina Court of Appeals made even a stronger holding.

> "Once [the defendant employer] voluntarily chose to publish the handbook and bulletin and orally assure the employee that the provisions of those publications would be followed, there were 'strong equitable and social policy reasons militating against allowing the employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice."

Section 5.G of the FSU Tenure Policies is couched in mandatory terms. The Toth Court, 712 F.Supp. at 1235 expressed itself strongly, when an employer ignores mandatory provisions of a handbook The Toth Court continued:

> The essential elements of any contract are mutual assent to be bound, usually demonstrated by offer and acceptance and exchange of valuable consideration.

Citing Baylon v. Bath, 189 S.C. 269, 270, 1 S.E.2d 139, 140 (1939); Mcpeters v. Yeargin Const. Co., 290 S.C. 327, 331, 350, S.E.2d 208, 210-211 (Ct. Of App. 1986).

Petitioner performed the conditions contained in the employer's promise. The breach of contract occurred on October 5, 1993, when the promise was broken.

CONCLUSION

Based on the foregoing considerations, the Petition for a writ of certiorari should be granted.

Respectfully submitted this the 2nd day of February, 1998.

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